

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MARCO T. BARBANTI,

Plaintiff,

v.

QUALITY LOAN SERVICE CORP., a
California Corporation; EDDIE
RAMIREZ AND JANE DOE RAMIREZ,
Husband and Wife; BANK OF NEW
YORK, a New York corporation, as
Trustee, Pursuant to the Terms
of That Certain Pooling and
Servicing Agreement Dated as of
11/1/96 Related to Metropolitan
Asset Funding Inc., Mortgage
Pass-through Certificates Series
1996-a; OCWEN LOAN SERVICING,
LLC, a Delaware corporation;
GINA JOHNSON AND JOHN DOE
JOHNSON,

Defendants.

NO. CV-06-0065-EFS

**ORDER ENTERING RULINGS FROM
NOVEMBER 21, 2006, HEARING**

A hearing was held in the above-captioned matter on November 21, 2006. Plaintiff was represented by Timothy Durkop. Matthew Cleverly appeared on behalf of Defendants Quality Loan Service Corp. and Eddie Ramirez (hereinafter collectively, "Quality Loan Defendants"), while Robert Wayne Norman Jr. appeared telephonically on behalf of the Bank of New York, Ocwen Loan Servicing, LLC ("Ocwen"), and Gina Johnson. Before the Court were a number of pending motions. After reviewing the

submitted material and applicable legal authority and hearing oral argument, the Court is fully informed. This Order serves to supplement and memorialize the Court's oral rulings.

I. MOTIONS RELATED TO FORFEITURE ACTION

A. Defendant Quality Loan Service Corporation and Eddie Ramirez' Motion to Set Aside Forfeiture Action (Ct. Recs. 26 & 117) and Plaintiff's Motion to Strike Defendant's Amended Motion to Set Aside Forfeiture and the Supplemental Memorandum (Ct. Rec. 130)

Quality Loan Defendants ask the Court to set aside the forfeiture action on the grounds that there was no forfeiture because it was improper and thus *void ab initio*. In the event the Court finds there was a forfeiture, Quality Loan Defendants maintain they have the ability to ask the Court to set it aside. Plaintiff opposes Quality Loan Defendants' motion, submitting that, although the forfeiture is erroneous, it is not automatically void and Quality Loan Defendants do not have the statutory authority to ask for the forfeiture action to be set aside. As explained below, the Court finds the forfeiture is void; however, the forfeiture currently cannot be set aside at Quality Loan Defendants' request because the Hoopers are not parties to this action.

The Washington Real Estate Contract Forfeitures Act, RCW 61.30 *et seq.*, governs the forfeiture process. Section 61.30.020(1) provides:

A purchaser's rights under a real estate contract shall not be forfeited except as provided in this chapter. Forfeiture shall be accomplished by giving and recording the required notices as specified in this chapter. This chapter shall not be construed as prohibiting or limiting any remedy which is not governed or restricted by this chapter and which is otherwise available to the seller or the purchaser. At the seller's option, a real estate contract may be foreclosed in the manner and subject to the law applicable to the foreclosure of a mortgage in this state.

The parties do not dispute that Quality Loan Defendants initiated a

1 forfeiture¹ proceeding against Mr. Barbanti and submitted notices to him.
 2 The parties also agree the forfeiture proceeding was in error because
 3 Mr. Barbanti was not the "purchaser" to the Deed of Trust that Quality
 4 Loan Defendants forfeited on behalf of the Bank of New York; rather Mr.
 5 Barbanti is the "purchaser" to the Hooper-Barbanti contract, a contract
 6 to which the Bank of New York is not the "seller." Given these
 7 undisputed facts, the Court finds the forfeiture is void because a
 8 requirement of RCW 61.30.030 was not met. Section 61.30.030 provides,
 9 in pertinent part:

10 It shall be a condition to forfeiture of a real estate
 11 contract that:

12 (2) A breach has occurred in one or more of the purchaser's
 13 obligations under the contract and the contract provides that
 as a result of such breach the seller is entitled to forfeit
 the contract;

14 This condition to forfeiture was not satisfied because the Bank of New
 15 York was not the "seller" under the Hooper-Barbanti contract and so it
 16 was not entitled to forfeit the contract. As a result, the Court finds
 17 the forfeiture is void. However, this does not correlate to a finding
 18 that the forfeiture is *void ab initio* because the Declaration of
 19 Forfeiture (DOF) was recorded:
 20

21 _____
 22 ¹ "Forfeit" or "forfeiture" is defined as a:

23 means to cancel the purchaser's rights under a real estate
 24 contract and to terminate all right, title, and interest in
 the property of the purchaser and of persons claiming by or
 25 through the purchaser, all to the extent provided in this
 chapter, because of a breach of one or more of the purchaser's
 26 obligations under the contract. A judicial foreclosure of a
 real estate contract as a mortgage shall not be considered a
 forfeiture under this chapter.

27 RCW 61.30.010(4).

28 ORDER -- 3

1 The recorded and sworn declaration of forfeiture shall be
2 prima facie evidence of the extent of the forfeiture and
3 compliance with this chapter, and except as otherwise provided
in RCW 61.30.040(1) and (2), conclusive evidence thereof in
favor of bona fide purchasers and encumbrancers for value.

4 RCW 61.30.100. Accordingly, even though the forfeiture is void, the DOF
5 is still of record; therefore, it must be declared void by a court.

6 Plaintiff contends the Court cannot set aside the forfeiture at the
7 request of Quality Loan Defendants, citing to RCW 61.30.080. Section
8 61.30.080 provides, in pertinent part:

9 (3) If the seller fails to give any required notice to all
10 persons whose interests the seller desires to forfeit or to
11 record such notice as required by this chapter, and if the
12 declaration of forfeiture has been given or recorded, the
13 seller may apply for a court order setting aside the
14 forfeiture previously made, and to the extent such order is
entered, the seller may proceed as if no forfeiture had been
commenced. *However, no such order may be obtained without
joinder and service upon the persons who were given the
required notices and all other persons whose interests the
seller desires to forfeit.*

15 (Emphasis added.) Conducting an analysis under this section is largely
16 nonsensical given that Mr. Barbanti and the Bank of New York are not the
17 purchaser and seller, respectively, under the same real estate contract.
18 Yet, this section is important as it is the only statute providing a
19 seller with a method to set aside a forfeiture. Accordingly, even
20 though the error here is not a failure to give adequate notice but
21 actually a lack of entitlement on behalf of the Bank of New York to
22 conduct a forfeiture of the instant real estate contract, the Court
23 determines it would be consistent with the Washington legislature's
24 intent to allow Defendants to utilize RCW 61.30.080(3) to set aside the
25 forfeiture. Nevertheless, subsection (3) specifically requires joinder
26 and service of all persons who were given the required notices; here,
27

1 the Hoopers received notices but have not been joined. Therefore, under
2 the present posture of this case, the Court cannot set aside the
3 forfeiture under RCW 61.30.080(3).

4 In summary, the Court finds the forfeiture is void because the Bank
5 of New York was not entitled to conduct a forfeiture under the Hooper-
6 Barbanti real estate contract because it was not the seller. However,
7 the forfeiture will not presently be set aside under RCW 61.30.080(3).
8 Accordingly, Quality Loan Defendants' motion is **granted in part and**
9 **denied with leave to renew in part.**

10 **B. Plaintiffs' Motion for Judgment on the Pleadings Pursuant to Fed.**
11 **R. Civ. Proc. 12(c) Re: Plaintiff's First Cause of Action (Ct. Rec.**
111)

12 Plaintiff asks the Court to declare that Quality Loan Defendants
13 violated the Real Estate Contract Forfeiture Act as alleged in
14 Plaintiff's first cause of action and, resultantly, Plaintiff is
15 entitled to a declaratory judgment declaring (a) that the Notice of
16 Intent to Forfeit (NOIF) and the DOF contain incorrect and erroneous
17 allegations of default and false statements and are void, invalid, and
18 in violation of governing law and (b) that the Defendants lacked the
19 legal authority to commence the real estate contract forfeiture
20 proceedings.

21 As discussed above, the parties do not dispute the fact that the
22 NOIF and the DOF contained errors; accordingly, the Court finds a
23 judgment on the pleadings in Plaintiff's favor is appropriate as to his
24 Real Estate Contract Forfeiture cause of action. *See Enron Oil Trading*
25 *& Transp. Co. v. Walbrook Ins. Co., Ltd.*, 132 F.3d 526 (9th Cir. 1997).
26 Therefore, the Court declares the NOIF and DOF contain incorrect and
27

erroneous allegations of default and that Defendants lacked the legal authority to commence the real estate contract forfeiture proceedings. Therefore, Plaintiff's motion is **granted**. However, the Court notes Plaintiff did not move for judgment regarding any damage issues; accordingly, the Court does not make any findings as to paragraph 52 of the Complaint, "Defendants Quality Loan, Ramirez, Johnson, OCWEN LLC and Bank of New York had actual knowledge or reason to know of the material failure to comply with RCW Chapter 61.30 or the contract or both." (Ct. Rec. 1.)

C. Quality Loan Defendants' Motion for Partial Summary Judgment Regarding Wrongful Forfeiture (Ct. Rec. 151)

Quality Loan Defendants ask the Court to enter summary judgment in their favor as to Plaintiffs' wrongful forfeiture cause of action because the forfeiture was void *ab initio* and, therefore, there was no forfeiture to set aside. As set forth above, the Court concludes a forfeiture occurred because the DOF was recorded and enters judgment in Plaintiffs' favor on his wrongful forfeiture cause of action. Accordingly, Defendants' motion for summary judgment is **denied in part**.

Second, Quality Loan Defendants ask the Court to find that Plaintiff is not entitled to damages under RCW 61.30.150(1) and (2). At the hearing, Plaintiff conceded he has insufficient evidence to survive summary judgment as to subsection (1); accordingly, Quality Loan Defendants' motion is **granted in part**.

Subsection (2) provides:

A seller who records a declaration of forfeiture with actual knowledge or reason to know of a material failure to comply with any requirement of this chapter is liable to any person whose interest in the property or the contract, or both, has been forfeited without material compliance with this chapter

1 for actual damages and actual attorneys' fees and costs of the
2 action and, in the court's discretion, exemplary damages.

3 Quality Loan Defendants contend Plaintiff cannot prove (1) Defendants
4 had actual knowledge or reason to know of a material failure to comply
5 with any requirement of the chapter, (2) that Plaintiff is a person
6 whose interest in the property or the contract has been forfeited, and
7 (3) Defendants failed to materially comply with the Real Estate Contract
8 Forfeiture Act ("the Act"). Upon review of the submitted materials,² the
9 Court finds a genuine issue of material fact exists as to whether
10 Quality Loan Defendants had reason to know of a material failure to
11 comply with the Act given that Quality Loan Defendants conducted a
12 forfeiture on behalf of the Bank of New York, yet it clearly was not the
13 seller under the Hooper-Barbanti contract. As to the second
14 requirement, the Court finds it is clear that Mr. Barbanti is a person
15 whose interest in the contract has been forfeited. Lastly, the Court
16 finds a genuine issue of material fact exists as to whether Quality Loan
17 Defendants materially complied with the Act. The finder of fact should
18 determine whether Defendants substantially complied with the Act's
19 requirement by using the template/database conversion process without

20 ² In ruling on the instant motions for summary judgment, the Court
21 recognizes that summary judgment is appropriate where the documentary
22 evidence produced by the parties permits only one conclusion. *Anderson*
23 *v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-252 (1986). The party seeking
24 summary judgment must demonstrate there is an absence of disputed issues
25 of material fact to be entitled to judgment as a matter of law. *FED. R.*
26 *CIV. PROC.* 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). A
27 burden is also on the party opposing summary judgment to provide
28 sufficient evidence supporting his claims to establish a genuine issue
of material fact for trial. *Anderson*, 477 U.S. at 252; *Chaffin*, 186
F.3d at 1213. In making its determinations, the Court viewed the facts
and drew inferences in the manner most favorable to the non-moving
party. *Anderson*, 477 U.S. at 255; *Chaffin v. United States*, 176 F.3d
1208, 1213 (9th Cir. 1999).

1 any apparent procedures in effect to ensure that the conversion was done
2 properly. Therefore, the Court **denies** Quality Loan Defendants' motion
3 **in part.**

4 II. MOTIONS RELATED TO UNAUTHORIZED PRACTICE OF LAW CLAIM

5 A. Plaintiff's Motion for Partial Summary Judgment Regarding the 6 Unauthorized Practice of Law (Ct. Rec. 54) *and* Defendants Quality 7 Loan and Ramirez [sic] Motion for Partial Summary Judgment 8 Regarding Unauthorized Practice of Law (Ct. Rec. 157)

9 Through his motion, Plaintiff asks the Court to enter the following
10 declaratory relief: (1) Quality Loan Defendants engaged in the
11 unauthorized practice of law, (2) Plaintiff is entitled to a permanent
12 injunction to prohibit the further unauthorized practice of law by
13 Quality Loan Defendants, and (3) Plaintiff suffered damages as a result
14 of Quality Loan Defendants' unauthorized practice of law. Quality Loan
15 Defendants filed both a response and a cross-motion for summary
16 judgment. Through their motion, Quality Loan Defendants ask the Court
17 to (1) find that the merging of objective data into a pre-drafted legal
18 form is not the practice of law, (2) if the Defendants did practice law,
19 such activities were authorized and Defendants' potential liability is
20 limited to that of actual damages suffered by Plaintiff, and (3)
21 Plaintiff's Consumer Protection Act (CPA) claim must be dismissed
22 because it is based on Plaintiff's unauthorized practice of law claim.

23 1. Undisputed Facts Related to These Motions

24 Quality Loan Service Corp. (Quality Loan) provides a service to
25 lenders by foreclosing on real property. In June 2005, Quality Loan was
26 contacted by Defendant Ocwen to advance a foreclosure on real property
27 commonly known as 5711 N. Division Street, Spokane, Wash. 99207. On or
28 about August 24, 2005, a NOIF was prepared by Quality Loan and signed by

1 Eddie Ramirez. Following, Quality Loan prepared a Declaration of
 2 Forfeiture on or about January 11, 2006. Neither Mr. Ramirez nor
 3 Quality Loan are licensed to practice law in Washington.

4 2. Authority and Analysis

5 To resolve these motions, the two critical questions are (1)
 6 whether Quality Loan Defendants' conduct constituted the practice of
 7 law, and if so (2) whether such conduct was authorized. If the conduct
 8 constituted the unauthorized practice of law, then Plaintiff's motion
 9 must be granted and Defendants' denied because neither Mr. Ramirez nor
 10 Quality Loan are licensed to practice law in Washington. See RCW
 11 2.48.170; *Wash. State Bar Assoc. v. Great W. Union Fed. Sav. & Loan*
 12 *Assoc.* ("Great Western"), 91 Wash. 2d 48, 56-57 (1978).

13 a. *Practice of Law*

14 "The line between those activities included within the definition
 15 of the practice of law and those that are not is oftentimes difficult to
 16 define." *Bennion, Van Camp, Hagen & Ruhl v. Kassler Escrow, Inc.*
 17 ("*Bennion*"), 96 Wash. 2d 443, 446 (1981). Yet, the Washington Supreme
 18 Court recognized the preparation of legal documents that create or
 19 impact legal rights as the practice of law:

20 The "practice of law" does not lend itself easily to precise
 21 definition. However, it is generally acknowledged to include
 22 not only the doing or performing of services in the courts of
 23 justice, throughout the various stages thereof, but in a
 24 larger sense includes legal advice and counsel and the
 25 preparation of legal instruments by which legal rights and
 26 obligations are established. Further, selection and
 27 completion of preprinted form legal documents has been found
 28 to be the "practice of law."

29 . . .
 The services at issue here are ordinarily performed by
 licensed attorneys, involve legal rights and obligations, and
 by their very nature involve the practice of law. We thus
 must agree with the trial court's conclusion that the

1 selection and completion of form legal documents, or the
2 drafting of such documents, including deeds, mortgages, deeds
of trust, promissory notes and agreements modifying these
documents constitutes the practice of law.

3 *Id.* at 446-47 (quoting *Great Western*, 91 Wash. 2d at 54-55); *Perkins v.*
4 *CTX Mortgage Co.*, 137 Wash. 2d 93, 97 (1999); *Washington v. Hunt*, 75
5 Wash. App. 795, 804 (1994) ("Washington law clearly prohibits an
6 unlicensed person from selecting and completing legal forms for another,
7"). It is the court's role to determine whether conduct
8 constitutes "the practice of law." *Bennion*, 96 Wash. 2d. at 452-53. In
9 determining whether conduct constitutes "the practice of law," the court
10 is to focus on the nature and character of the service rendered, rather
11 than the fact of compensation or the nature or status of the person
12 performing the services. *Id.* at 451; *Hunt*, 75 Wash. App. at 802.

13 With these legal principles in mind, the Court concludes Quality
14 Loan Defendants engaged in the practice of law by preparing and issuing
15 the NOIF and the DOF. A Notice of Intent to Forfeit vests all rights in
16 the subject property with the seller or the sellers' successor in
17 interest. RCW 61.30.020(1). The Declaration of Forfeiture serves to
18 terminate the purchaser's right, title, and interest in the property and
19 under the contract. RCW 61.30.070(1)(f) & (2)(d). Accordingly,
20 conducting a forfeiture through the issuance of a NOIF and DOF has legal
21 consequences on the parties to the documents. The nature and character
22 of these services are consistent with conduct that an attorney would
23 engage in; therefore, preparing and issuing the NOIF and preparing the
24 DOF to further the forfeiture constitute the practice of law.

25
26 *b. Authorization*

27 The next question is whether Quality Loan Defendants' conduct was

1 "authorized." The most recent Washington Supreme Court decision on this
2 issue is *Perkins v. CTX Mortgage Co.*, 137 Wash. 2d 93 (1999). In
3 *Perkins*, the Washington Supreme Court addressed whether a mortgage
4 lender engaged in the unauthorized practice of law by having lay
5 employees enter customer information such as social security and bank
6 account numbers, the loan amount, and interest rate on residential home
7 loan agreement documents; templates for these documents were created by
8 attorneys who created a document for each loan product and who
9 supervised the programming of the computer when the form templates were
10 prepared. After considering the risks and benefits to the public of
11 allowing lay employees to engage in such conduct, the Washington Supreme
12 Court determined the lay employees engaged in the practice of law, but
13 that the conduct was authorized because the lay employees did not
14 exercise any legal discretion. *Id.* at 102-03. In reaching this
15 decision, the court relied upon its *Cultum v. Heritage House Realtors,*
16 *Inc.*, 103 Wash. 2d 623 (1985), decision, in which a real estate agent
17 was found to have engaged in the authorized practice of law:

18 It should be emphasized that the holding in this case is
19 limited in scope. Our decision provides that a real estate
20 broker or salesperson is permitted to complete simple printed
21 standardized real estate forms, which forms must be approved
22 by a lawyer, it being understood that these forms shall not be
23 used for other than simple real estate transactions which
24 arise in the usual course of the broker's business and that
25 such forms will be used only in connection with real estate
26 transactions actually handled by such broker or salesperson as
27 a broker or salesperson and then without charge for the simple
28 service of completing the forms.

24 *Perkins*, 137 Wash. 2d at 100-01 (quoting *Cultum*, 103 Wash. 2d at 630).
25 The court in *Perkins* distinguished the facts from those in *In re Droker*
26 and *Great Western*, finding that in these two other cases the lay
27

1 employees did more than enter objective data into legal forms. *Id.* at
2 103-04. The Washington Supreme Court commented, "We have tacitly
3 authorized lay persons to fill in the names of parties, the legal
4 descriptions of properties, and other similar information and have
5 expressly left open whether mere scrivenering would constitute the
6 unauthorized practice of law." *Id.* at 104-05.

7 Quality Loan Defendants contend their conduct was authorized
8 because the lay employees were not using legal discretion as the
9 contract-specific information was simply merged onto a template. David
10 Owen, the Chief Operations Officer for Quality Loan, provided a
11 declaration, stating "our computer system contains a forms library with
12 form templates and a database of information regarding the loan
13 transactions." (Ct. Rec. 154 ¶ 6.) "When the documents were merged, the
14 incorrect data in the database was merged into the incorrect form." *Id.*
15 ¶ 7. "No language in the form was selected, added or deleted when it
16 was merged. The only information added to the form was the objective
17 data from the database." *Id.* ¶ 8. The Court finds the submitted
18 evidence is insufficient to support a finding that *Perkins* controls. In
19 *Perkins*, there was evidence that attorneys selected the legal form
20 templates to begin with and oversaw the process by which the database of
21 information was created. Here, Quality Loan Defendants have not
22 provided any evidence explaining how these forms were initially selected
23 and how the conversion process was initially set up. Therefore, it is
24 unclear whether attorneys or lay persons were involved in making the
25 legal decisions. Accordingly, at this stage, the Court is unable
26 balance "the competing public interests of (1) protecting the public
27

1 from the harm of the lay exercise of legal discretion and (2) promoting
2 convenience and low cost." *Perkins*, 137 Wash. 2d at 105.

3 Quality Loan Defendants also argue their conduct was "authorized"
4 because RCW 61.30.050(1) specifically allows an "agent" to advance a
5 forfeiture proceeding.³ Given that the legislature does not have the
6 ability to allow an unlicensed individual to practice law, *see Bennion*,
7 96 Wash. 2d at 446, and in light of the rule of statutory interpretation
8 that statutes are to be construed as constitutional if possible, *see*
9 *Gould v. Aerospatiale Helicopter Corp.*, 40 F.3d 1033, 1035 (9th Cir.
10 1994); *United States v. Buckland*, 289 F.3d 558, 564 (9th Cir. 2002), the
11 Court interprets RCW 61.30.050(1) as allowing Mr. Ramirez, as an agent
12 for the seller to *sign* the document -- however, this does not impact the
13 requirement that the NOIF be *prepared* by one who is authorized to
14 practice law.

15 In summary, the Court finds Quality Loan Defendants engaged in the
16 practice of law, but genuine issues of material fact remain as to
17 whether such conduct was authorized. Therefore, Plaintiff's motion is
18 **granted in part** (Defendants engaged in the practice of law) **and denied**
19 **in part** (genuine issues of material fact relating to whether conduct was
20 _____

21 ³ Section 61.30.050(1) provides:

22 The required notices shall be in writing. The notice of
23 intent to forfeit shall be *signed by the seller or by the*
24 *seller's agent or attorney*. The declaration of forfeiture
25 shall be signed and sworn to be the seller. The seller may
26 execute the declaration of forfeiture through an agent under
27 a power of attorney which is of record at the time the
28 declaration of forfeiture is recorded, but in so doing the
seller shall be subject to liability under RCW 61.30.150 to
the same extent as if the seller had personally signed and
sworn to the declaration.

(Emphasis added.)

1 authorized; Plaintiff is not entitled to an injunction at this stage;
2 and damage issues to be resolved at trial), and Quality Loan Defendants'
3 motion is **denied** (engaged in practice of law; genuine issues of material
4 fact relating to whether conduct was authorized; and damage issues to be
5 resolved at trial).

6 **B. Quality Loan Defendants' Request for Judicial Notice in Support of**
7 **Opposition to Plaintiff's Motion for Partial Summary Judgment (Ct.**
8 **Rec. 81) and Plaintiff's Motion to Strike (Ct. Rec. 86)**

9 Quality Loan Defendants ask the Court to take judicial notice of
10 the following documents: (1) the Hooper-Barbanti Real Estate Contract,
11 (2) the Barbanti-Royal Pottage Enterprises, Inc. Quit Claim Deed, (3)
12 the Hooper-Metropolitan Mortgage & Securities Deed of Trust, (4) the
13 Metropolitan Mortgage & Securities - Bank of New York Assignment of Deed
14 of Trust, and (5) Plaintiff's Complaint. Rather than file a response to
15 this Request, Plaintiff filed a Motion to Strike, in which he asked the
16 Court to strike the Request for Judicial Notice and also other
17 documents. The Court finds it is inappropriate to take judicial notice
18 of the requested documents under Federal Rule of Evidence 201(b);
19 accordingly, Quality Loan Defendants' request is **denied** and Plaintiff's
20 motion is **granted in part**. The Court **denies the remainder** of
21 Plaintiff's motion, which asked the Court to strike the Declaration of
22 Susan Chang (Ct. Rec. 79), the Declaration of Eddie Ramirez (Ct. Rec.
23 80), and the cited portions of Defendants' Opposition to Plaintiff's
24 Motion for Partial Summary Judgment (Ct. Rec. 83).

25 **C. Plaintiff's Motion to Strike the Declarations of David Owen and**
26 **Eddie Ramirez From Consideration in the Motion for Partial Summary**
27 **Judgment (Ct. Rec. 166)**

28 Plaintiff asks the Court to strike David Owen's Declaration (Ct.

1 Rec. 154) and Eddie Ramirez' Declaration (Ct. Rec. 153) on the grounds
2 that (1) they are unnecessary as Quality Loan Defendants previously in
3 Ct. Rec. 82 advised they did not challenge Plaintiff's Statement of
4 Material Facts, (2) the declarations fail to comply with RCW 9A.72.085,
5 and (3) the declarations lack proper foundation and contain hearsay.

6 Although Quality Loan Defendants should have submitted a Statement
7 of Facts in connection with their opposition to Plaintiff's motion
8 regarding the unauthorized practice of law, the Court does not strike
9 the declarations because Plaintiff was not prejudiced by Quality Loan
10 Defendants' failure to comply with Local Rule 56.1. In addition, the
11 Court concludes the declarations do not fail to comply with RCW
12 9A.72.085 because the statement "I declare the above to be true and
13 correct to the best of my knowledge," was also joined by the following
14 statements in paragraph 1, "I am over the age of eighteen, have direct
15 knowledge of the facts and circumstances of this litigation, and I am
16 competent to testify in this matter," and in paragraph 3, "[a]s to the
17 following facts, I know them to be true of my own personal knowledge,
18 and if called upon to testify in this action, I could and would testify
19 competently thereto." The Court finds the purposes of RCW 9A.72.085 are
20 satisfied by these statements. The Court also denies Plaintiff's
21 foundation, personal knowledge, and hearsay challenges to these
22 declarations. Therefore, in summary, Plaintiff's motion to strike is
23 **denied.**

24 **D. Quality Loan Defendants' Motion to Strike Portions of Declarations**
25 **of Marco Barbanti (Ct. Rec. 177)**

26 Quality Loan Defendants ask the Court to strike or disregard ¶¶ 8,
27 9, 10, and 11 of the Declaration of Marco T. Barbanti (Ct. Rec. 165) on

1 the grounds that Mr. Barbanti's statements are not statements of fact
2 based upon personal knowledge but are rather arguments about the
3 sufficiency of the declarations in other filings. After reviewing the
4 submitted material, the Court **grants** Quality Loan Defendants' motion to
5 strike paragraphs 9, 10, and 11, but **denies** the motion to strike
6 paragraph 8.

7 III. SLANDER OF TITLE

8 A. Quality Loan Defendants' Motion to Dismiss Plaintiff's Slander of 9 Title Claim (Ct. Rec. 120) and Motion to Expedite Hearing thereon (Ct. Rec. 126)

10 Quality Loan Defendants highlight that Plaintiff failed to amend
11 his slander of title claim within three weeks of the Court's July 7,
12 2006, Order. Given Plaintiff's failure to amend and lack of response to
13 the motion, the Court **grants** this motion. Also, because the motion was
14 not heard on an expedited basis, the Court **denies as moot** Quality Loan
15 Defendants' motion to expedite.

16 IV. INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONSHIPS

17 A. Ocwen's Motion for Summary Judgment on Plaintiff's Claim for 18 Intentional Interference with Contractual Relationships (Ct. Rec. 188)

19 Ocwen asks the Court to enter judgment in its favor on Plaintiff's
20 claim for Intentional Inference with Contractual Relationships on the
21 grounds that there are no disputed issues of material facts. Plaintiff
22 opposes the motion, contending he has presented sufficient facts, when
23 viewed in his favor, to prove Ocwen intentionally interfered with Mr.
24 Barbanti's contractual relationship with his tenant. After taking the
25

1 matter under advisement, the Court now denies Ocwen's motion.⁴

2 In order to prove interference with contractual relations,
3 Plaintiff must prove the following five elements: (1) the existence of
4 a valid contractual relationship or business expectancy; (2) that
5 Defendants had knowledge of that relationship; (3) an intentional
6 interference inducing or causing a breach or termination of the
7 relationship or expectancy; (4) that Defendants interfered for an
8 improper purpose or used improper means; and (5) resultant damages. See
9 *Commodore v. Univ. Mech. Contractors, Inc.*, 120 Wash. 2d 120, 137
10 (1992). First, it is undisputed that Plaintiff had a valid contractual
11 relationship with a bridal store tenant. (Ct. Rec. 221 Ex. D: Lease
12 Agreement.) Second, Ocwen in its reply acknowledged that it contacted
13 the bridal store tenant (Ct. Rec. 233 p. 3); accordingly, Ocwen had
14 knowledge of the tenant relationship. Third, although the tenant is
15 still in the property, the Court finds Mr. Barbanti's testimony
16 regarding the tenant's decision to stop paying rent until the forfeiture
17 matter is resolved is sufficient to establish a genuine issue of
18 material fact as to whether Ocwen's attempt to forfeit the property
19 caused a breach or termination of the relationship.

21 ⁴ The parties bring to the forefront a typographical error that was
22 contained in the Court's July 7, 2006, Order on pages 2-3, where the
23 Court should have stated "slander of title" rather than "wrongful
24 interference with contractual relationship" when discussing that
25 Plaintiff failed to plead sufficient facts. It was not the Court's
26 intent to dismiss the intentional interference with contractual
27 relationship cause of action; and this intent is apparent from the
28 Court's discussion on pages 18-19, where the Court denies as moot
Quality Loan Defendants' motion to dismiss the wrongful interference
with contractual relationship cause of action and in the "It is hereby
ordered" section where the Court repeats that it denies as moot this
request. Accordingly, Plaintiff's wrongful interference with
contractual relationship cause of action survived the motion to dismiss.

1 Fourth, Ocwen argues Plaintiff cannot show there was any
2 interference based on an improper purpose or that improper means were
3 used because Ocwen, and its agent, reasonably believed that a forfeiture
4 had occurred and thus were correct in asking the tenant to leave.
5 Although the Court finds the interference was not for an improper
6 purpose because there is no evidence before the Court that Ocwen should
7 have been aware that the forfeiture was erroneous, the Court finds there
8 is a genuine issue of material fact as to whether Ocwen's agent used
9 improper means given that Ocwen, for purposes of this motion, did not
10 dispute with evidence Mr. Barbanti's recitation regarding the
11 interaction between the tenant and Ocwen.

12 Lastly, although the Court agrees Plaintiff will have a mitigation
13 issue at trial, the Court finds Plaintiff presented sufficient evidence
14 of damages in order to survive summary judgment. Although the tenant
15 did not pay the full \$1,300 consistently prior to this forfeiture, since
16 the contact with the Ocwen agent, the tenant has not been willing to pay
17 Mr. Barbanti any rent.

18 For the above reasons, the Court **denies** Ocwen's motion.

19 **V. COLLECTION AGENCY ACT AND CONSUMER PROTECTION ACT**

20 **A. Quality Loan's Motion for Partial Summary Judgment Regarding**
21 **Plaintiff's Third and Fifth Causes of Action (Consumer Protection**
22 **Act and Collection Agency Act) (Ct. Rec. 178)**

23 Defendant Quality Loan asks the Court to enter judgment in its
24 favor as to Plaintiff's Consumer Protection Act (CPA) cause of action
25 and Washington Collection Agency Act (CAA) cause of action on the
26 grounds that there are no disputed issues of material fact. Plaintiff
27 opposes the motion, submitting that Quality Loan is wrong on the law and

1 that there are genuine issues of material fact that preclude a summary
2 judgment ruling in favor of Quality Loan. As set forth below, the Court
3 **grants** Quality Loan's motion.

4 1. Relevant Undisputed Facts

5 The forfeiture documents sent by Quality Loan were mailed via first
6 class and certified mail to a list of people provided by the title
7 company as parties who might have an interest in the subject property;
8 Plaintiff and his attorney both were mailed a copy of the forfeiture
9 documents via certified mail. The current tenant of the property is a
10 bridal shop. Quality Loan has never been appointed successor trustee.

11 2. Legal Authority and Analysis

12 The Washington Collection Agency Act, RCW 19.16 *et seq.*, governs
13 collection activities in Washington by both collection agencies and out-
14 of-state collection agencies. The act defines "collection agency" as
15 "[a]ny person directly or indirectly engaged in soliciting claims for
16 collection, or collecting or attempting to collect claims owed or due or
17 asserted to be owed or due another person," RCW 19.16.100(2)(a); but the
18 statute also sets forth several exclusions from this definition.

19 One of the exclusions is an "out-of-state collection agency." RCW
20 19.16.100(3)(e). An "out-of-state collection agency" means:

21 a person whose activities within this state are limited to
22 collecting debts from debtors located in this state by means
23 of interstate communications, including telephone, mail, or
24 facsimile transmission, from the person's location in another
25 state on behalf of clients located outside of this state, but
does not include any person who is excluded from the
definition of the term "debt collector" under the federal fair
debt collection practices act (15 U.S.C. Sec. 1692a(6)).

26 RCW 19.16.100(4). Accordingly, the parties agree that if a person is
27 excluded from the definition of "debt collector" under the federal Fair

1 Debt Collection Practices Act (FDCPA), then they are not a debt
2 collector under the CAA. Quality Loan contends it is not a debt
3 collector under the FDCPA because nonjudicial foreclosure of property
4 interests is not debt collection, citing to *Heineman v. Jim Walter*
5 *Homes*, 47 F. Supp. 2d 716, 722 (N.D. W. Va. 1988), and *Hulse v. Ocwen*
6 *Federal Bank, FSB*, 195 F. Supp. 2d 1188, 1204 (D. Or. 2002). Plaintiff
7 maintains *Hulse* and *Heineman* are bad precedent and further that they do
8 not apply to the facts of this case.

9 FDCPA defines "debt collector" as:

10 any person who uses any instrumentality of interstate commerce
11 or the mails in any business the principal purpose of which is
12 the collection of any *debts*, or who regularly collects or
13 attempts to collect, directly or indirectly, *debts* owed or due
14 or asserted to be owed or due another. . . For the purpose of
15 section 1692f(6) of this title, such term also includes any
16 person who uses any instrumentality of interstate commerce or
17 the mails in any business the principal purpose of which is
18 the enforcement of security interests.

19 15 U.S.C. § 1692a(6) (emphasis added). "Debt" is then defined as:

20 any obligation or alleged obligation of a consumer to pay
21 money arising out of a transaction in which the money,
22 property, insurance, or services which are the subject of the
23 transaction are primarily for personal, family, or household
24 purposes, whether or not such obligation has been reduced to
25 judgment.

26 *Id.* § 1692a(5).

27 The Court is persuaded by the reasoning in *Hulse* and finds this
28 matter distinguishable from *Piper v. Portnoff Law Associates, Ltd.*, 396
F. 3d 227 (3d Cir. 2005), which was relied upon by Plaintiff. In *Hulse*,
the Oregon district court determined that defendant was not collecting
a debt:

foreclosing on a trust deed is distinct from the collection of
the obligation to pay money. The FDCPA is intended to curtail
objectionable acts occurring in the process of collecting

1 funds from a debtor. But foreclosing on a trust deed is an
2 entirely different path. Payment of funds is not the object
3 of the foreclosure action. Rather, the lender is foreclosing
4 its interest in the property.

5 195 F. Supp. 2d at 1204. Two other district courts determined that
6 enforcement of a security interest is not debt collection for all
7 purposes of the FDCPA, but only for purposes of 15 U.S.C. § 1692f(6).
8 See *Bergs v. Hoover, Bax & Slovacek, L.L.P.*, 2003 WL 22255679 (N.D.
9 Texas 2003); *Rosado v. Taylor*, 324 F. Supp. 917 (N.D. Ind. 2004). The
10 Court is persuaded that the inclusion of an enforcer of a security
11 interest in § 1692f(6) implies that the term "debt collector" does not
12 include an enforcer of a security interest for any other section of the
13 FDCPA. Accordingly, the Court determines the enforcement of a security
14 interest through a nonjudicial forfeiture does not constitute the
15 collection of a debt for purposes of the FDCPA. Resultantly, the Court
16 finds Quality Loan is not a debt collector under the FDCPA in these
17 circumstances, and therefore not a debt collector for purposes of the
18 CAA. For this reason, the Court grants Quality Loan Defendants'
19 motion, thereby dismissing both the CAA cause of action and the related
20 CPA cause of action.

21 VI. OTHER MOTIONS

22 A. Plaintiff's Motion for Leave to Amend Complaint to Name John Doe 23 Johnson and for Leave to Serve the Specifically Named Defendant 24 (Ct. Rec. 200)

25 Plaintiff asks for leave to amend the Complaint to add the name of
26 the husband of Defendant Gina Johnson, rather than listing him as "John
27 Doe Johnson" and to serve him with the Amended Complaint. Gina Johnson
28 opposes the motion, submitting this Court does not have personal
jurisdiction over Mr. Johnson.

1 Federal Rule of Civil Procedure 15 governs amendment of pleadings.
2 "A party may amend the party's pleading . . . [after a responsive
3 pleading is served] only by leave of court or by written consent of the
4 adverse party; and leave shall be freely given when justice so
5 requires." FED. R. CIV. P. 15(a). Given that the purpose of pleadings is
6 "to facilitate a proper decision on the merits," *Conley v. Gibson*, 355
7 U.S. 41, 48 (1957), Rule 15 is to be applied with "extreme liberality,"
8 *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir.
9 2003) (quoting *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074,
10 1079 (9th Cir. 1990)). Furthermore, formal and burdensome impediments
11 should not be erected during the litigation process. *Id.*

12 After considering the factors set forth in *Foman v. Davis*, 371 U.S.
13 178 (1962), the Court **grants** Plaintiff's motion. There was a delay
14 between the filing of the Complaint and this motion; however, the delay
15 was due to Ms. Johnson's answer denying that she was married. Although
16 the discovery period and the dispositive motion deadlines have passed,
17 the Court concludes Defendants will not be unfairly prejudiced by
18 allowing Plaintiff to amend the Complaint to specifically identify Mr.
19 Johnson given that Defendants were put on notice that Plaintiff was
20 seeking to recover from the Johnson marital community. As to
21 Plaintiff's motive, there is no indication that Plaintiff failed to
22 earlier identify Mr. Johnson in bad faith. Lastly, although Ms. Johnson
23 may be correct that personal jurisdiction is lacking over Mr. Johnson,
24 the Court determines the better course is to allow the complaint to be
25 amended. Accordingly, the Court grants Plaintiff leave to file an
26 Amended Complaint which replaces "John Doe Johnson" with "Theodore
27

1 Johnson." The Court notes that this amendment relates back to the date
2 of the original pleading under Federal Rule of Civil Procedure 15(c)(3),
3 so long as service is timely as the claim arises out of the same conduct
4 or transaction set forth in the original pleading.

5 **B. Joinder Motions**

6 The Court finds good cause to grant Ocwen, Bank of New York, and
7 Johnson's Joinder to Quality Loan's Motion for Partial Summary Judgment
8 Regarding Unauthorized Practice of Law (Ct. Rec. 192), Joinder to
9 Quality Loan's Motion for Partial Summary Judgment Re Wrongful
10 Forfeiture (Ct. Rec. 193), and Joinder to Quality Loan's Motion for
11 Partial Summary Judgment Re Consumer Protection Act and Collection
12 Agency Act (Ct. Rec. 194).

13 For the reasons given above, **IT IS HEREBY ORDERED:**

14 1. Defendant Quality Loan Service Corporation and Eddie Ramirez'
15 Motion to Set Aside Forfeiture Action (Ct. Rec. 26) and Defendant
16 Quality Loan Service Corporation and Eddie Ramirez' Amended Motion to
17 Set Aside Forfeiture Action (Ct. Rec. 116) are **GRANTED IN PART**
18 (forfeiture is void) **and DENIED WITH LEAVE TO RENEW IN PART** (cannot set
19 aside forfeiture under RCW 61.30.080(3) currently).

20 2. Plaintiff's Motion to Strike Defendant's Amended Motion to Set
21 Aside Forfeiture and the Supplemental Memorandum (Ct. Rec. 130) is
22 **DENIED.**

23 3. Plaintiffs' Motion for Judgment on the Pleadings Pursuant to
24 Fed. R. Civ. Proc. 12(c) Re: Plaintiff's First Cause of Action (Ct. Rec.
25 **111)** is **GRANTED.** The NOIF and DOF contain incorrect and erroneous
26 allegations of default, and Defendants lacked the legal authority to
27

1 commence the real estate contract forfeiture proceedings.

2 4. Quality Loan Defendants' Motion for Partial Summary Judgment
3 Regarding Wrongful Forfeiture (**Ct. Rec. 151**) is **DENIED IN PART** (judgment
4 is not entered in favor of Quality Loan on wrongful forfeiture cause of
5 action; and genuine issues of material fact related to RCW 61.30.150(2)
6 damages claim) **and GRANTED IN PART** (RCW 61.30.150(1)).

7 5. Plaintiff's Motion for Partial Summary Judgment Regarding the
8 Unauthorized Practice of Law (**Ct. Rec. 54**) is **GRANTED IN PART**
9 (Defendants engaged in the practice of law) **and DENIED IN PART** (genuine
10 issues of material fact relating to whether conduct was authorized;
11 Plaintiff is not entitled to an injunction at this stage; and damage
12 issues to be resolved at trial).

13 6. Quality Loan Defendants' Motion for Partial Summary Judgment
14 Regarding Unauthorized Practice of Law (**Ct. Rec. 157**) is **DENIED** (engaged
15 in practice of law; genuine issues of material fact relating to whether
16 conduct was authorized; and damage issues to be resolved at trial).

17 7. Quality Loan Defendants' Request for Judicial Notice in
18 Support of Opposition to Plaintiff's Motion for Partial Summary Judgment
19 (**Ct. Rec. 81**) is **DENIED**.

20 8. Plaintiff's Motion to Strike (**Ct. Rec. 86**) is **GRANTED IN PART**
21 (strike Quality Loan's Request for Judicial Notice) **and DENIED IN PART**
22 (all other aspects).

23 9. Plaintiff's Motion to Strike the Declarations of David Owen
24 and Eddie Ramirez From Consideration in the Motion for Partial Summary
25 Judgment (**Ct. Rec. 166**) is **DENIED**.

26 10. Quality Loan Defendants' Motion to Strike Portions of
27

1 Declarations of Marco Barbanti (**Ct. Rec. 177**) is **GRANTED IN PART** (§§ 9,
2 10, & 11) **and DENIED IN PART** (§ 8).

3 11. Quality Loan Defendants' Motion to Dismiss Plaintiff's Slander
4 of Title Claim (**Ct. Rec. 120**) is **GRANTED**.

5 12. Quality Loan Defendants' Motion to Expedite Hearing on their
6 Motion to Dismiss Plaintiff's Slander of Title Claim (**Ct. Rec. 126**) is
7 **DENIED AS MOOT**.

8 13. Ocwen's Motion for Summary Judgment on Plaintiff's Claim for
9 Intentional Interference with Contractual Relationships (**Ct. Rec. 188**)
10 is **DENIED**.

11 14. Quality Loan's Motion for Partial Summary Judgment Regarding
12 Plaintiff's Third and Fifth Causes of Action (Consumer Protection Act
13 and Collection Agency Act) (**Ct. Rec. 178**) is **GRANTED**.

14 15. Plaintiff's Motion for Leave to Amend Complaint to Name John
15 Doe Johnson and for Leave to Serve the Specifically Named Defendant (**Ct.**
16 **Rec. 200**) is **GRANTED**. Plaintiff is given **two weeks** from entry of this
17 Order to amend the Complaint as requested.

18 16. Ocwen, Bank of New York, and Johnson's Joinder to Quality
19 Loan's Motion for Partial Summary Judgment Regarding Unauthorized
20 Practice of Law (**Ct. Rec. 192**), Joinder to Quality Loan's Motion for
21 Partial Summary Judgment Re Wrongful Forfeiture (**Ct. Rec. 193**), and
22 Joinder to Quality Loan's Motion for Partial Summary Judgment Re
23 Consumer Protection Act and Collection Agency Act (**Ct. Rec. 194**) are
24 **GRANTED**.

25 17. Quality Loan Defendants' Motion to Compel Discovery (**Ct. Rec.**
26 **172**) is **RESET** to be heard telephonically on **December 13, 2006, at 2:00**
27

1 **p.m.** The parties are to call into the Court's public conference line
2 (509-376-8880; use of cell phones is prohibited).

3 **IT IS SO ORDERED.** The District Court Executive is directed to
4 enter this Order and to provide a copy to counsel.

5 **DATED** this 11th day of December 2006.

6
7 S/ Edward F. Shea
8 EDWARD F. SHEA
9 UNITED STATES DISTRICT JUDGE

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